UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 00-3175

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NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

EBROADBURL REALTY CORP. t/a
POWER EQUIPMENT COMPANY

Respondent

_____

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

_____

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF JURISDICTION

This case is before the Court upon the application of the National Labor Relations Board ("the Board") to enforce against Ebroadburl Realty Corp., t/a Power Equipment Company ("the Company") a Board order that was issued on November 22, 1999, and is reported at 330 NLRB No. 20. (A 6-13.)[1] The Board had subject matter jurisdiction over the proceeding below under

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[1] "A" refers to the joint appendix. References preceding a semicolon are to the Board's findings; those following are to supporting evidence.

Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § 151, 160(a)) ("the Act"), which empowers the Board to prevent unfair labor practices affecting commerce. The Court has jurisdiction over this proceeding under Section 10(e) of the Act (29 U.S.C. § 160(e)) because the unfair labor practice occurred in Hainesport, New Jersey. The Board's order is a final order. The Board filed its application for enforcement on February 23, 2000. The application was timely filed, as the Act imposes no time limit for filing an application for enforcement of a Board order.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging employee Jonathan Smith because of his union activities.

STATEMENT OF THE CASE

Acting on an unfair labor practice charge filed against the Company by the International Brotherhood of Electrical Workers, AFL-CIO, Local 269 ("the Union"), the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)). (A 6; 285-86, 289.) After a hearing, an administrative law judge issued a recommended decision sustaining the complaint allegation. The Company filed exceptions to the administrative

law judge's decision. (A 370-92.) On November 22, 1999, the Board issued a decision and order, upholding the administrative law judge's findings and conclusions, and adopting his recommended order. (A 6-13.)

I. THE BOARD'S FINDINGS OF FACT

A. Background; The Company's Long History of Not Laying Off Employees Despite Repeated Slowdowns; the Company Hires New Employees, Including Electrician Jonathan Smith

Since its inception in 1974, the Company has primarily engaged in selling, servicing and maintaining electrical generators. (A 6; 172, 174.) Between December and March of each year, the Company experienced a dramatic slow-down of its service-related work. (A 7 & n.2; 194.) The Company's longstanding policy was to keep even its skilled employees working at their customary wage rates during those winter months, even though they often had to work at menial tasks outside of their trade, such as sweeping floors or sorting trash. (A 7 n.6; 192, 196.) Consistent with that policy, the Company had never laid off an employee in its 21-year history prior to the events giving rise to this case. (A 7 n.6; 191, 196, 228.) Company President William Friend took pride in the Company's policy disfavoring layoffs. (A 7 n.6, 11; 191.)

In 1995, the Company began to expand its business to include heating, ventilation, and air-conditioning work. (A 7;

172.) In January 1996, the Company further expanded its business to include large-scale electrical contracting, purchasing an electrical contracting company. (A 7; 172-74.) Pursuant to those expansions, the Company hired various skilled workers, including electricians. (A 7; 262-267.)

In August 1996, the Company successfully bid on a major contract ("Cream-O-Land"), which called for substantial plumbing, air-conditioning duct, ventilation, and electrical work. (A 7; 174.) In early November 1996, the Company hired two additional electricians, Jonathan Smith and Maurice Wood. (A 7; 178-81.) Wood was employed elsewhere at the time, and accepted the job with the Company only because Company President Friend assured him there was plenty of work and that he would not be laid off. (A 8, 11; 146, 166-67.) Unbeknownst to the Company at the time he was hired, Smith was a member of the Union, and had agreed to act as an unpaid organizer for it. (A 7; 41, 51.) After starting his employment, Smith regularly reported to the Union by telephone about goings-on at the job. (A 7 n.9; 42-43.)

Smith and Wood performed work on the Cream-O-Land contract and on another electrical project. (A 11; 107-08.) They also performed electrical service work. (A 11; 52, 66, 107, 110, 147, 294-297, 301-03, 310-19, 350-51.) After the second project ended around the end of January, Smith and Wood continued to

perform electrical service work but also performed non-electrical work, including installing a boiler and dishwasher, and sorting material. (A 4, 8 n.11, 11; 54-55, 67, 168, 325-27, 355-60, 363-69.) Smith never complained about an assignment because it was non-electrical, and never refused an assignment. (A 8 n.15, 11; 53, 68, 72-73.) Friend viewed Smith as a good worker. (A 8 n.15, 11; 211.)

B. About Four Months After Hiring Employee Smith, the Company Learns that He is an Organizer for the Union; a Day and a Half Later, the Company Lays Off Smith

In mid-February 1997, Smith began his organizing efforts by talking to Wood about the Union. (A 7; 43, 58.) The Company began to experience a slowdown around that time. (A 7-8 n.10; 109, 147, 150.) On February 25, the Union notified the Company by facsimile of Smith's union activities. (A 8; 44, 45, 273-74.) The Company received the letter at about 1 p.m. that day. (A 8 & n.12; 207-08.)

When Smith reported to work the next day, the shop supervisor advised him that there was no work for him, and sent him home. (A 8; 55.) The following day, February 27, Friend laid off Smith and Wood, citing a lack of work as the sole reason. (A 8 & n.13; 55, 69, 149, 246.) Prior to that time, the Company had never suggested to Smith or Wood that layoffs were imminent, and no other employees were laid off. (A 11; 56,

166, 213.) At the time of the February layoff, the Company promised to recall Smith and Wood when work picked up. (A 11; 56, 70, 166, 204.) By April, the Company had hired two new electricians. In July, it hired a third new electrician. (A 7 & n.4; 98, 220-23, 263-64.) The Company never recalled Smith or Wood. (A 11; 75, 154.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Fox, Liebman and Brame) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging employee Smith because of his protected union activities. (A 6-13.)

The Board's order requires the Company to cease and desist from the unfair labor practice found, and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. (A 12.) Affirmatively, the order requires the Company to offer Smith reinstatement and to make him whole for any losses suffered; to remove from its records any reference to Smith's unlawful discharge; and to post copies of a remedial notice. (A 12.)

STATEMENT OF RELATED CASES

This case has not previously been before this Court. Board counsel are not aware of any related case or proceeding that is

completed, pending, or about to be presented to this Court, any other court, or any state or federal agency.

STATEMENT OF THE STANDARD OR SCOPE OF REVIEW

The Board's findings of fact are "conclusive" if supported by substantial evidence on the record considered as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); Universal Camera Corp. v. NLRB, 340 U.S. 474, 493 (1951); Hunter Douglas, Inc. v. NLRB, 804 F.2d 808, 812 (3d Cir. 1986), cert. denied, 481 U.S. 1069 (1987). A reviewing court may not displace the Board's choice between two fairly conflicting views of the evidence, "even though [the] court acting de novo might have reached a different conclusion." Hunter Douglas, Inc. v. NLRB, 804 F.2d at 812 (citing Universal Camera Corp. v. NLRB, 340 U.S. at 488.)

In particular, "[t]he resolution of issues of credibility is clearly not for the Court." NLRB v. Buitoni Foods Corp., 298 F.2d 169, 171 (3d Cir. 1962). Instead, "great deference" should be given to the credibility determinations of the administrative law judge, who conducted the hearing and observed the witnesses. ABC Trans-National Transp. v. NLRB, 642 F.2d 675, 684-86 (3d Cir. 1981). Moreover, as this Court has recognized, under the substantial evidence standard of review, considerable deference also should be given to the Board's inferences and conclusions drawn from the proven facts. Hedstrom Co. v. NLRB, 629 F.2d 305, 316 (1980) (en banc), cert. denied, 450 U.S. 996 (1981);

NLRB v. Scott Printing Corp., 612 F.2d 783, 787 (3d Cir. 1979). This includes inferences of unlawful motivation, which are rarely supported by direct evidence and must, instead, be drawn from circumstantial evidence. NLRB v. Scott Printing Corp., 612 F.2d 783, 787-88 (3d Cir. 1979).

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging employee Jonathan Smith because of his union activity. The Company does not dispute the Board's finding that Smith's discharge was motivated, at least in part, by Smith's union activities. Substantial evidence supports the Board's further finding that the Company failed to prove its affirmative defense that it would have discharged Smith even in the absence of his union activities.

As the Board determined, the Company failed to establish that it discharged Smith because of a lack of work. It is undisputed that the Company had never before laid off a worker, despite repeated slowdowns in work. Indeed, the Company took pride in the fact that it had retained even skilled workers during slowdowns, assigning them menial tasks in order to keep them working. Here, in contrast to that history, the Company laid off Smith almost immediately upon learning that he was a union organizer. Notably, although Smith's layoff was

unprecedented, the Company failed to produce any records or financial evidence that the slowdown in February 1997 was different from previous winter slowdowns, none of which had ever resulted in layoffs. And, despite the allegedly dramatic slowdown in work at that time, the Company never warned that a layoff was imminent, laid off no other workers besides Smith and Wood, and never recalled them, though it had promised to do so. Instead, the Company hired three replacement electricians a short time later.

In disputing the Board's finding that it failed to meet its burden under Wright Line, the Company principally relies on unsubstantiated explanations for the layoff offered at the hearing by its president, William Friend. The administrative law judge and the Board reasonably discredited that testimony as inconsistent with Friend's contemporaneous explanation to Smith of his reasons for the layoff, the affidavit he provided during the initial investigation of the unfair labor practice charge, the more credible testimony of other witnesses, and documentary evidence, in addition to finding it inherently implausible in view of the circumstances surrounding the layoffs. The Company offers no good reason to disturb those credibility findings.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING EMPLOYEE JONATHAN SMITH BECAUSE OF HIS UNION ACTIVITIES

A. Applicable Principles

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)((3)) makes it an unfair labor practice for an employer to discriminate "in regard to tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization . . . ." Accordingly, an employer violates Section 8(a)(3) and (1) of the Act by discharging an employee for engaging in union activity.[2] NLRB v. Transportation Management Corp., 462 U.S. 393, 398 (1983); Hunter Douglas, Inc. v. NLRB, 804 F.2d 808, 809, 813-816 (3d Cir. 1986), cert. denied, 481 U.S. 1069 (1987).

Cases arising under Section 8(a)(3) usually turn on whether the employer's action was motivated by the employee's union activity. See NLRB v. Eagle Material Handling, Inc., 558 F.2d 160, 169-170 (3d Cir. 1977). In NLRB v. Transportation

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[2] A violation of Section 8(a)(3) of the Act is also a "derivative" violation of Section 8(a)(1) of the Act, which makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights . . . ." See Painters Local 277 v. NLRB, 717 F.2d 805, 808 n.4 (3d Cir. 1983); NLRB v. Newark Morning Ledger Co., 120 F.2d 262, 265 and n.1, 267 (3d Cir.), cert. denied, 314 U.S. 693 (1941).

Management Corp., 462 U.S. 393 (1983), the Supreme Court approved the test for determining motivation in unlawful discrimination cases first articulated by the Board in Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083 (1980), enforced on other grounds, 662 F.2d 89 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). Under that test, if substantial evidence supports the Board's finding that antiunion considerations were a "motivating factor" in a discharge, the Board's conclusion must be affirmed, unless the record, considered as a whole, compelled the Board to accept the employer's affirmative defense that the employee would have been fired even in the absence of protected activity. See NLRB v. Transportation Management Corp., 462 U.S. 393, 397, 401-403 (1983).

If the Board finds that the reason advanced by the employer did not exist or that the employer did not in fact rely upon it, the inquiry ends; there is no remaining basis for finding that the employer would have taken the adverse action even in the absence of the employee's activity. Painters Local 277 v. NLRB, 717 F.2d 805, 812 (3d Cir. 1983); Wright Line, 251 NLRB at 1084. The Board need not accept at face value the employer's explanation for a discharge if the evidence and the reasonable inferences drawn therefrom indicate the discharge was motivated by union animus. NLRB v. Buitoni Foods Corp., 298 F.2d 169, 174

(3d Cir. 1962); Justak Bros. and Co. v. NLRB, 664 F.2d 1074, 1077 (7th Cir. 1981) (Board need not accept employers' explanation where it "furnished the excuse rather than the reason for [its] retaliatory action") (citation omitted). As this Court has stated, "the policy and protection of the [Act] does not allow the employer to substitute 'good' reasons for 'real' reasons when the purpose of the discharge is to retaliate for an employee's concerted activities." Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1352 (1969), cert. denied, 397 U.S. 935 (1970).

B. The Company Failed To Meet Its Burden of Demonstrating It Would Have Discharged Smith Even in the Absence of His Union Activities

The Company does not challenge the Board's finding that, in discharging Smith, it was motivated, at least in part, by Smith's union activities. Instead, the Company now argues only that it carried its burden of proving that it would have discharged Smith even in the absence of his protected activities. See Br 1-2 (statement of the issue presented), 12 (arguing Board order should not be enforced "regardless of whether [or] not the General Counsel established a prima facie case"). Although the Company's brief waives any challenge to the Board's finding that union animus was a motivating factor in

Smith's discharge,[3] the evidence supporting that finding, such as the timing, suddenness and abruptness of Smith's unexpected discharge only 2 days after the Company learned of Smith's organizational activity,[4] places the Company's failed affirmative defense in context. As we now show, the record fully supports the Board's rejection of the Company's defense.

As the Board found (A 11), although the Company claims it would have laid off Smith because of lack of work, its sudden decision to lay off Smith and Wood in response to the absence of available skilled work reflected a radical departure from its past response to work slowdowns. As shown in the Statement of the Case, the Company had never laid off a worker for any reason, notwithstanding its annual winter work slowdowns, even

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[3] See Merkle v. Upper Dublin Sch. District, 211 F.3d 782, 790 n.8 (3d Cir. 2000) (issue waived if not raised in opening brief); Laborers' Int'l Union of N. Am. v. Foster Wheeler Corp., 26 F.3d 375, 398 (3d Cir.) ("An issue is waived unless a party raises it in its opening brief, and for those purposes "a passing reference to an issue . . . will not suffice to bring that issue before this court."), cert. denied, 513 U.S. 946 (1994).

[4] See Hunter Douglas, Inc. v. NLRB, 804 F.2d 808, 814 (3d Cir. 1986) (abruptness of discharge coinciding with culmination of union's authorization card drive warranted inference of antiunion motive), cert. denied, 481 U.S. 1069 (1987); Herman Bros. v. NLRB, 658 F.2d 201, 210 (3d Cir. 1981) (timing of sudden change in procedure and resulting discharge, immediately after protected activity, supports inference of unlawful motive); American Geri-Care v. NLRB, 697 F.2d 56, 61 (2d Cir. 1982) (Board properly inferred unlawful motive from "stunningly obvious" timing of adverse employment action).

though the typical slowdown was so dramatic that, according to Company President Friend, "during the months of December and January, February and March, you might as well shut your phone off for service work because it doesn't happen." (A 7 n.2; 194.)

In the absence of known union activity, however, the Company's response to those circumstances was uniformly to assign its skilled workers other jobs, including such menial tasks as sweeping floors or sorting trash, rather than laying them off. As the Board emphasized (A 11), the Company failed to produce any records or financial evidence that the February 1997 slowdown was any more dramatic than the previous winter slowdowns.[5] Accordingly, the Company's departure from its own past practice belies its assertion that it would have laid off Smith for lack of work absent his known union activity. See Property Resources Corp. v. NLRB, 863 F.2d 964, 967 (D.C. Cir. 1988) (layoffs would not have occurred but for union animus, where past practice was to transfer funds between divisions rather than lay employees off); NLRB v. Teknor-Apex Co., 468 F.2d 692, 694 (1st Cir. 1972) (lack of work no justification for

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[5] See NLRB v. Treasure Lake, Inc., 453 F.2d 202, 204 (3d Cir. 1971) (defense that discharges were economically motivated failed where employer's failure to provide documentation implied that evidence would be adverse to company).

layoff where usual practice had been to transfer employees within the plant); NLRB v. Yale Manufacturing Co., 356 F.2d 69, 74 (1st Cir. 1966) (violation found where employer departed from its policy of never laying off workers during annual winter slowdowns).[6]

In addition, the circumstances surrounding the February 1997 layoff independently cast doubt on the Company's stated reason for the layoff. As the Board found (A 11), in spite of the alleged dramatic slowdown in February 1997, the credited evidence established that the Company gave no warning that layoffs were imminent prior to learning that Smith was a union organizer. Yet, after learning of Smith's activity, it abruptly sent him home with no work, something that had never happened before (A 55), and laid him off the next day, which was also unprecedented. Moreover, as the Board found (A 11), no workers

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[6] Notably, in each case the Company relies upon before this Court (Br 13 n.4), the employer's affirmative defense succeeded in large part because its actions were consistent with past practice. See Hanlon & Wilson Co. v. NLRB, 738 F.2d 606, 616 (3d Cir. 1984); NLRB v. General Security Services Corp., 162 F.3d 437, 446 (6th Cir. 1998); Synergy Gas Corp. v. NLRB, 19 F.3d 649, 653 (D.C. Cir. 1994). In any event, contrary to the Company's suggestion, the fact that employers in other cases, with different facts, sustained their Wright Line burdens obviously does not demonstrate that the Company did so here.

other than Smith and Wood were laid off.[7] Notably, the Company fails to explain why no HVAC workers were laid off, in spite of the fact that the Cream-O-Land project, which ended in late January, was also a large project for HVAC work. (A 128.)

As the Board also found (A 7, 11), the Company's hiring of three replacement electricians shortly after the layoffs, without recalling Smith or Wood as promised, further undermines its claim that it would have terminated Smith for lack of work. See NLRB v. Armcor Industries, Inc., 535 F.2d 239, 243 (3d Cir. 1976) (rejecting defense that "indefinite layoff" resulted from end of major contract, where company hired 21 new employees within 90 days); Kentucky General Inc. v. NLRB, 177 F.3d 430, 436-37 (6th Cir. 1999) (rejecting defense that layoff of two union supporters was required by slowdown following phase-out of large project, where contractor hired three new electricians within a month). The Company's contention (Br 19-20 n.7) that the new employees had fundamentally different job duties than Smith and Wood, notwithstanding that all were designated as "electricians," is unsupported by the record.

In arguing that the Board should have accepted its affirmative defense, the Company principally relies on Company President Friend's testimony as to his reasons for the

[7] As the Board noted (A 8 n.14), no charge was filed with respect to Wood's discharge. The Board therefore did not

unprecedented layoff of employees.[8] That reliance is misplaced because the Board reasonably discredited the bulk of Friend's testimony. Indeed, much of that testimony was inconsistent with Friend's contemporaneous actions and statements or was contradicted by other, more credible witnesses. For example, Friend's testimony (A 205) that he laid off Smith on Monday, February 24, before learning Smith was a union organizer was, as the administrative law judge noted, contrary both to the testimony of Smith and Wood and to Friend's earlier affidavit. Friend's affidavit clearly indicated that he received the Union's letter on February 25 and that he told Smith that he was laid off on February 27 or 28. (A 8 & n.13, 10 n.23; 55, 149, 231-34, 246.) Friend's dubious attempts to explain away that plain discrepancy (A 10 n.23; 233) only reinforce the lack of credibility of his trial testimony.[9]

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address whether that discharge was lawful.

[8] The Company makes much of the fact that electrician Wood and hourly employee Frank Emers confirmed the existence of the February work slowdown. The slowdown is uncontested, however. As shown, the issue is whether the slowdown was of such magnitude as to justify the Company's abrupt departure from its past practice of keeping skilled employees on during slow periods. As the Board found (A 9), neither Wood nor Emers was competent to testify in that regard.

[9] On appeal, without acknowledging the Board's contrary finding, the Company continues to assert that Smith was laid off on February 24 (Br. 9, 10).

Friend's lack of credibility was further demonstrated by his attempts at the hearing to offer two new explanations for Smith's layoff, which the administrative law judge (A 8 n.15) rejected as "makeweight." First, Friend asserted (A 172) -- as the Company (Br 5, 11, 13) continues to maintain here -- that Smith and Wood had been hired only for the Cream-O-Land project. Second, he contended that Smith refused to perform non-electrical work. (A 203.) Friend, however, gave neither of those reasons at the time of Smith's layoff. (See A 8; 55.) The Company's belated assertion of those explanations for Smith's layoff itself supports the Board's finding that they were pretextual. See Kenrich Petrochemicals, Inc. v. NLRB, 893 F.2d 1468, 1480 (3d Cir.) (rejecting as pretextual a "belated explanation" for discharge mentioned for the first time at hearing), vacated in part on other grounds, 907 F.2d 400 (3d Cir.) (en banc), cert. denied, 498 U.S. 986 (1990); Cumberland Farms, Inc. v. NLRB, 984 F.2d 556 (1st Cir. 1993) (upholding Board finding that discharge was unlawful where employer failed to mention additional grounds at time of discharge); Property Resources Corp. v. NLRB, 863 F.2d 964, 967 (D.C. Cir. 1988) (rejecting employer's Wright Line defense where employer maintained before the Board reasons not raised at the time of layoff). See also NLRB v. Dorothy Shamrock Coal Co., 833 F.2d

1263, 1269 (7th Cir. 1987) (employer's shifting explanations for layoff "severely undermine[d]" its credibility).

Moreover, the factual predicates for those after-the-fact explanations were expressly and reasonably discredited by the Board. First, the Company is simply wrong to characterize as "uncontradicted" (Br 11) and "unrebutted" (Br 13) its repeated assertion (Br 5, 11, 13, 17) that Smith and Wood were hired solely to work on the Cream-O-Land project. To the contrary, the administrative law judge and the Board (A 8 n.15, 11) expressly discredited Friend's testimony on this point, based on the undisputed fact that the Company kept Smith and Wood working after the Cream-O-Land project ended (e.g., A 107, 182), and Wood's testimony that he left another job to work for the Company based on Friend's assurances that there was plenty of work, and that he would not be laid off. (A 146, 166.)

Friend's testimony that Smith refused to cross-train was similarly rejected by the administrative law judge and the Board (A 8 n.15, 11), in light of evidence that Smith never refused an assignment for any reason (A 72-73), frequently worked outside his trade (A 55, 67), and indeed was working outside his trade installing a boiler a day and a half before his layoff (A 55).[10]

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[10] Abandoning that "explanation" on appeal, the Company characterizes the Board's decision to discredit Friend in this regard as of "no significance." (Br 19 n.7.)

The Company offers no good reason to overturn the administrative law judge's credibility findings, which, as shown above, are entitled to great deference.[11]

Presumably because its argument that Smith was hired only for the Cream-O-Land project was so thoroughly undermined by the credited evidence, the Company (Br 17) now adds a twist and asserts that "Smith and Wood were hired solely to work on electrical projects, beginning with the Cream-O-Land project." This latest revision of its rationale for the layoffs also must fail.

The Company (Br 5, 14, 18) attempts to support its theory that Smith and Wood were hired exclusively for project work by pointing to the fact that it was the Cream-O-Land project that prompted the Company to expand its workforce, resulting in Smith and Wood's hiring. That additional personnel were needed because of Cream-O-Land does not, without more, establish that

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[11] In vain, the Company attempts to make much of the Board's determination (A 6 n.2) not to rely on the administrative law judge's finding that Friend was referring to organizing when he testified, "this is the thanks I get for being a nice guy." (See Br 3, 20.) Contrary to the Company's assertions (Br 3, 20), the Board did not make alternate findings about what Friend meant, nor did it "reject" the administrative law judge's finding as a "transparent misreading." Rather it simply did "not rely" on the finding. (A 6 n.2.) That finding was not necessary to its decision because, as we have demonstrated, the Board found that there was ample other evidence supporting the judge's decision.

the duties or tenure of anyone hired because of that need were to be limited to Cream-O-Land, or were otherwise different from those of other employees with the same job classification.

The Company (Br 6, 14, 18) fares no better in relying on Friend's testimony that Smith and Wood worked exclusively on Cream-O-Land until that project ended. That testimony was flatly contradicted by company timesheets and Smith's testimony that demonstrate both Smith and Wood performed service work during that time. (A 52, 63, 294-97, 301-03, 350-51.) Accordingly, the Company's argument (Br 17) that there was no evidence to disprove its assertion that Smith and Wood were hired exclusively to work on electrical projects is wrong as a matter of fact.

In any event, the Company ignores the fact that it bore the burden of proving its affirmative defense. The Board was not constrained to credit Friend's unsupported and undocumented view of Smith's role, especially given Friend's discredited proffer of several other makeweight justifications for his actions, and the Board (A 11) reasonably did not do so.

In sum, the Company does not contest that Smith's union activities were a motivating factor in the Company's decision to lay him off. As shown above, the Board reasonably found that the Company failed to establish that it would have discharged Smith in the absence of his union activity. Accordingly, the

Board properly concluded that the Company's discharge of Smith violated the Act.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should enter a judgment enforcing the Board's order in full.

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